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No. 94-849

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

JOSEPH M. McDADE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Speech or Debate Clause of the Constitution precluded trial of petitioner on each of the counts of the indictment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A61) is reported at 28 F.3d 283. The opinion of the district court (Pet. App. A62-A158) is reported at 827 F. Supp. 1153.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1994. A petition for rehearing was denied on August 9, 1994. Pet. App. 159a-160a. The petition for a writ of certiorari was filed on November 7, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a Member of the United States House of Representatives, was indicted in the United States District Court for the Eastern District of Pennsylvania on two counts of conspiring to defraud the United States of his honest services and to seek and accept illegal gratuities (Counts 1 and 3), in violation of 18 U.S.C. 371; two counts of accepting illegal gratuities (Counts 2 and 4), in violation of 18 U.S.C. 201(c)(1)(B) (formerly 18 U.S.C. 201(g) (1982)); and one count of racketeering (Count 5), in violation of 18 U.S.C. 1962(c) (RICO). Petitioner moved to dismiss the indictment under the Speech or Debate Clause of the Constitution, Art. I, § 6, Cl. 1. The district court denied the motion. On interlocutory appeal under the collateral order doctrine, the court of appeals affirmed.

1. The indictment identified petitioner as a Member of the House of Representatives who became the "ranking minority member of the House Small Business Committee" in 1982, and the "ranking minority member of the House Appropriations Committee, Subcommittee on Defense Appropriations," in 1985. C.A. App. 45-46.

Count 1 alleged that petitioner conspired to defraud the United States of its right to his honest services as a Member of Congress and to seek, accept, and receive illegal gratuities from a small business named United Chem Con Corporation (UCC), in violation of 18 U.S.C. 371. C.A. App. 46, 49-50. In particular, the indictment alleged, petitioner agreed to solicit and accept "sham campaign contributions, free aircraft transportation," and other things of value, "in return for his influence and * * * his support for UCC's interests in obtaining and maintaining UCC's government contracts and Small Business Administration program eligibility." *Id.* at 50.

The indictment identified 47 overt acts carried out in furtherance of the conspiracy charged in Count 1. C.A. App. 51-58. Those overt acts included petitioner's "caus[ing] a letter to be directed to the Secretary of the Navy warning that the Navy's decision to issue a 'stop work' order on UCC's * * * production [of Navy "Sea Shed" cargo containers] would be viewed by [petitioner] with 'extreme gravity.'" *Id.* at 54 (overt act 16). The overt acts also included petitioner's acceptance of numerous things of value, including sham campaign contributions, free air transportation and lodging at resorts on three occasions, and free air transportation on many other occasions, frequently in private planes. Among them were petitioner's acceptance of "free private round-trip aircraft transportation from UCC from Washington, D.C. to Scranton, Pennsylvania" on May 6, 1987. *Id.* at 58 (overt act 43). Count 2 charged a substantive violation of 18 U.S.C. 201(c)(1)(B) based on petitioner's acceptance of that free air transportation. C.A. App. 59.

Count 3 charged a similar conspiracy involving several defense contractors, including the Grumman Corporation and the Sperry Corporation. Petitioner allegedly "would and did solicit, receive and accept sham campaign contributions, 'scholarship' checks, free private aircraft transportation," and other illegal gratuities "in return for his influence and * * * his support for Grumman and Sperry's interests in maintaining and obtaining government contracts." C.A. App. 63. The indictment identified 18 overt acts carried out in furtherance of the conspiracy. *Id.* at 64-66. Those overt acts included petitioner's writing "to the Secretary of the Army requesting that the Army delay in making a final decision" in awarding a "second source" contract for an Army radio system. *Id.* at 66

(overt act 17). The overt acts also included his acceptance of numerous things of value, including checks for his son's college expenses, sham campaign contributions, free air transportation and lodging at a resort, and "free air transportation from Grumman from Washington, D.C. to Philadelphia, Pennsylvania and then from Philadelphia, Pennsylvania to Scranton, Pennsylvania" on July 15, 1988. *Ibid.* (overt act 18). Count 4 charged a substantive violation of 18 U.S.C. 201(c)(1)(B) based on petitioner's acceptance of that free air transportation. C.A. App. 67.

Finally, Count 5 charged petitioner with conducting and participating in a RICO enterprise. The enterprise was identified as an association in fact, consisting of petitioner's "Congressional offices in Washington, D.C., and in the 10th Congressional District of Pennsylvania," and the individuals who worked for petitioner in those offices and who worked at his direction as staff members of the congressional committees on which petitioner held positions. C.A. App. 68. The object of the alleged racketeering activity was to "use [petitioner's] Office as a vehicle to solicit and receive bribes and illegal gratuities * * * from various defense contractors and lobbyists." *Id.* at 69.

2. Petitioner moved to dismiss the indictment on the ground that it violated the Speech or Debate Clause of the Constitution. He claimed that the conduct alleged in the indictment consisted of protected "legislative" conduct for which he could "not be questioned" outside of Congress itself. In particular, he claimed that his status as a member of congressional committees was protected and could not be alleged in the indictment. See C.A. App. 142-154. He also claimed that, "because many of the allegations in the indictment involve legislative acts and motivations, the Speech or Debate Clause prevents the

government from forcing [petitioner] to defend himself based on those actions and motivations." *Id.* at 104.

The district court denied petitioner's motion to dismiss. Pet. App. A62-A158. The court held that "[t]he Speech or Debate Clause was not intended to immunize members of Congress from criminal or civil prosecution merely because of their status. * * * Simply being a member of Congress or a committee member is not a [protected] legislative act." *Id.* at A89. The court also held that petitioner was entitled to introduce evidence of legislative acts in his own defense, but that "[t]he government is not forcing [petitioner] to waive his legislative privilege or introduce evidence of his legislative acts in this case." *Id.* at A86.

3. Petitioner took an interlocutory appeal under the collateral order doctrine. See *Helstoski* v. *Meanor*, 442 U.S. 500, 506-508 (1979). The court of appeals affirmed. Pet. App. A1-A61.

a. First, the court rejected petitioner's contention that the indictment had to be dismissed because it referred to his position as ranking minority member of both the House Subcommittee on Defense Appropriations and the House Small Business Committee. Citing this Court's decision in *United States* v. *Brewster*, 408 U.S. 501 (1972), the court noted that it is "well settled—and it is conceded by [petitioner]—that the Speech or Debate Clause does not prohibit proof of a defendant's status as a member of the United States Senate or House of Representatives." Pet. App. A10 (footnote omitted). The court concluded that the Speech or Debate Clause provides no greater protection for petitioner's status as a member of a congressional committee. That conclusion was particularly appropriate, the court explained, because the text of the Speech or Debate Clause refers to "Senators and

Representatives" and "confers rights on members of Congress in their capacity as members," not based on "membership on a congressional committee." *Id.* at A15. Finally, the court noted that the indictment in *Brewster*, which was upheld by this Court against a Speech or Debate Clause challenge, had referred to Senator Brewster's membership on a Senate committee. *Id.* at A16 (citing *Brewster*, 408 U.S. at 502; *id.* at 529 (Brennan, J., dissenting)).

In concluding that the indictment was not defective because it referred to petitioner's status as a member of congressional committees, the court of appeals distinguished the Eleventh Circuit's decision in *United States* v. *Swindall*, 971 F.2d 1531 (1992), cert. denied, 114 S. Ct. 683 (1994), which held that certain counts of an indictment that referred to the defendant's membership on a congressional committee violated the Speech or Debate Clause. The court of appeals acknowledged that the opinion in *Swindall* stated that "the privilege [of the Speech or Debate Clause] protects legislative status as well as legislative acts." Pet. App. A19 (quoting *Swindall*, 971 F.2d at 1543). But the court explained that the point of that statement was that "the distinction between legislative 'status' and legislative 'activity' is not dispositive for Speech and Debate Clause purposes." *Id.* at A21. As the court of appeals explained, the basis of the decision in *Swindall* was that the Speech or Debate Clause would be violated "if prosecutors could inquire into a member's committee status *for the purpose of showing that the member had acquired knowledge of the contents of the bills considered by his or her committees*." *Id.* at A21-A22. Since the indictment in this case "does not recite * * * [petitioner's] committee memberships or positions for the purpose of establishing that he thereby acquired knowledge of bills under

consideration by the committee," the court concluded that "*Swindall's* holding regarding legislative status is inapplicable" in this case. *Id.* at A23.

b. The court of appeals also rejected petitioner's claim that the indictment required him to introduce evidence of protected legislative acts in his own defense. The court reasoned that the text of the Speech or Debate Clause "protects a member of Congress from being 'questioned,' and a member is not 'questioned' when he or she chooses to offer rebuttal evidence of legislative acts." Pet. App. A26-A27. Moreover, the court found petitioner's claim "contrary to the clear implication of" *Brewster*. *Id.* at A27. Noting that *Brewster* had involved a bribery indictment, the court explained that "[s]uch a charge * * * often makes it tactically advantageous for a member to respond with proof of his or her legislative acts." *Ibid.*

c. The court of appeals also rejected petitioner's claim that the RICO charge against him was invalid because the government could not prove the existence of the RICO enterprise without proving that petitioner performed legislative acts. Pet. App. A29. The court held that the government would be able to establish the RICO enterprise "by proof relating to *official* but (for Speech or Debate Clause purposes) non-legislative acts." *Id.* at A31. The court explained that "the Clause does not shield 'a wide range of legitimate "errands" performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called "news letters" to constituents, news releases, and speeches delivered outside the Congress.'" *Id.* at A31-A32 (quoting *Brewster*, 408 U.S. at 512). In addition, the court held, "the prosecution may also be able to prove the existence of the enterprise in question by evidence relating

to unofficial or ultra vires conduct." *Id.* at A32. Introduction of such evidence would not violate the Speech or Debate Clause. *Ibid.*

d. Finally, the court of appeals rejected petitioner's claim that the district court should have dismissed the entire indictment because it was vague or because there was uncertainty as to whether certain allegations concerned legislative or purely political acts.

First, the court determined that the Speech or Debate Clause did not require dismissal of any part of the indictment for vagueness. The court explained that the Clause imposes no special pleading requirements and that the 43-page indictment was sufficiently detailed to provide adequate notice of the nature of the charges. Pet. App. A38-A39.

Second, the court found it unnecessary for the district court to conduct a pretrial hearing, based on special and detailed allocations of the burden of proof and of production, to ascertain whether certain of the charges in the indictment should have been dismissed because they were based on conduct protected by the Speech or Debate Clause. No hearing or other procedure was needed, the court held, with respect to either of the two categories of allegations—travel and Executive Branch contacts—that petitioner claimed were so vague as to require pretrial proceedings.

Relying on the Second Circuit's opinion in *United States* v. *Biaggi*, 853 F.2d 89, 104 (1988), cert. denied, 489 U.S. 1052 (1989), the court held that "travel by a member of Congress to or from a location where the member performs legislative acts is not itself protected by the Speech or Debate Clause." Pet. App. A40-A41. Thus, Counts 2 and 4 (based on petitioner's air travel as alleged in overt act 43 of Count 1 and overt act 18 of Count 3,

respectively) did not violate the Clause. Petitioner does not appear to challenge that holding before this Court.

The court of appeals did not reach petitioner's claim that his contacts with the Secretaries of the Navy and Army, as charged in overt act 16 of Count 1 and overt act 17 of Count 3, were protected activities pertaining to legislative "oversight" of the Executive Branch. First, because a conspiracy charge under 18 U.S.C. 371 need only allege a single overt act, the court concluded that, "[e]ven if * * * both of the overt acts in question are invalid, no charge in the indictment would have to be dismissed" because the indictment alleged numerous other overt acts. Pet. App. A46. Second, the question whether the overt acts should be stricken from the indictment would have no "evidentiary significance," *id.* at A48, since it would have no bearing on whether the government would attempt to prove them, or would be permitted to prove them, at trial, *id.* at A49. Accordingly, having determined that no count in the indictment had to be dismissed, the court reasoned that the only remaining issue was simply whether certain evidence, which the government may or may not attempt to introduce at trial, would be inadmissible under the Speech or Debate Clause. That issue, the court held, was not properly before it because "a ruling on the admissibility of evidence at a criminal trial is not completely separate from the merits of the case," *id.* at A50, and therefore would not be appealable under the collateral order doctrine, *id.* at A50-A51.

4. Judge Scirica dissented in part (Pet. App. A51-61), explaining that he believed that the court had "jurisdiction to decide whether overt acts in the indictment violate the Speech or Debate Clause" and that "one of the overt acts here may be privileged." *Id.* at A52. Judge Scirica stated that he would "require the

district court to determine prior to trial whether the overt acts violate the Clause." *Id.* at A61. In "all other respects," Judge Scirica "fully join[ed] the majority opinion." *Id.* at A52.

ARGUMENT

Petitioner claims (Pet. 7-23) that the court of appeals erred in refusing to dismiss any part of the indictment for violation of the Speech or Debate Clause, in refusing to strike portions of the indictment proof of which would in his view violate the Speech or Debate Clause, and in refusing to require the district court to institute procedures to screen the evidence in advance of trial to ensure that he had a pretrial opportunity to appeal any erroneous evidentiary rulings concerning the Speech or Debate Clause. None of those claims warrants this Court's review.

1. a. Petitioner argues (Pet. 14) that the indictment charges conduct directly protected by the Speech or Debate Clause, because it alleges that petitioner was the "ranking minority member of the House Appropriations Committee, Subcommittee on Defense Appropriations." C.A. App. 2.

The court of appeals correctly held that reference to, or proof of, petitioner's membership on a congressional committee does not violate the Speech or Debate Clause. This Court's decisions in *United States* v. *Brewster*, 408 U.S. 501 (1972), and *United States* v. *Helstoski*, 442 U.S. 477 (1979), establish that the Speech or Debate Clause does not forbid the prosecution of a Member of Congress for taking bribes. As this Court explained in *Brewster*, the controlling inquiry is "whether it is necessary to inquire into how [the defendant] spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation of [the statute

under which he was indicted]." 408 U.S. at 526.[1] Where a bribe is charged, an allegation of the reasons why it was offered—*i.e.*, an allegation that the defendant held a position as a Member of Congress or of a congressional committee—"does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them." *Ibid.* So long as the government does not attempt to show how the defendant "acted, voted, or decided," the bribery charge can stand. *Id.* at 527. See also *United States* v. *Helstoski*, 442 U.S. at 487-489.

In *Brewster*, the Court applied those standards to reverse the dismissal of an indictment on Speech or Debate Clause grounds. The indictment charged that the defendant, a former Senator, had accepted bribes in exchange for being influenced in the performance of official acts in his capacity as a Member of the Senate and of a Senate committee. Indeed, as the court of appeals in this case noted (Pet. App. A16), the indictment in *Brewster* specifically referred to the defendant's service on a Senate committee. See 408 U.S. at 502; *id.* at 529 (Brennan, J., dissenting). Nonetheless, this Court

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[1] The Court repeated numerous times in *Brewster* that the dispositive question is whether the indictment requires inquiry into such "legislative acts." See 408 U.S. at 512 ("a Member of Congress may be prosecuted under a criminal statute provided that the Government's case does not rely on legislative acts or the motivation for legislative acts"); *id.* at 525 ("Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts"); *id.* at 526 ("[t]aking a bribe is, obviously, * * * not a legislative act" nor "is inquiry into a legislative act or the motivation for a legislative act necessary to a prosecution under this statute or this indictment"); *id.* at 528 (refusing to "retreat from the Court's position in [*United States* v. *Johnson*, 383 U.S. 169 (1966)] that a Member may be convicted if no showing of legislative act is required").

reversed the district court's dismissal of the indictment, on the ground that the charge that the defendant, when he was a Senator, had solicited and received bribes to perform official acts did not require proof that the defendant in fact fulfilled his promise to perform those legislative acts in return for the bribe. *Brewster*, 408 U.S. at 527; see Pet. App. A11-A13.

That holding controls this case. The indictment alleges that petitioner was a member of two House committees, but does not refer to, or require proof of, any actual committee work or other legislative activity, such as voting or consideration of particular bills. As in *Brewster*, the reference to petitioner's position as a committee member merely establishes petitioner's official position and thereby makes clear the purpose for which the gratuity was offered. Accordingly, proof of the allegation of petitioner's membership on the committee does not require any inquiry that would be forbidden by the Speech or Debate Clause.

In any event, as the court of appeals recognized (Pet. App. A15-A16), petitioner's argument that the indictment could not allege any facts about his membership on a congressional committee is inconsistent with the undisputed principle that "the Speech or Debate Clause permits proof of a defendant's status as a member of Congress." *Id.* at A14.[2] There is no basis in the text or

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[2] Petitioner appears to recognize that this Court held in *Brewster* that, at a minimum, an indictment may allege that the defendant was a member of Congress without violating the Speech or Debate Clause. But he attempts to distinguish *Brewster* on the ground that, "while membership in Congress is a necessary element of the crimes charged in *Brewster* * * *, committee membership is not a necessary element to be proven in any crime." Pet. 12. The indictment in *Brewster*, however, alleged not only the defendant's status as a Member of Congress, but also

purposes of the Speech or Debate Clause or in any decision of this Court to accord greater protection to petitioner's role on a congressional committee than to his membership in Congress. So long as the reference to the defendant's official position does not substitute for or otherwise require an inquiry into his actual legislative acts, it is permissible under the Speech or Debate Clause.

b. Petitioner asserts (Pet. 20-23) that the court of appeals' holding that the Speech or Debate Clause does not bar proof of petitioner's membership on a congressional committee conflicts with the Eleventh Circuit's decision in *United States* v. *Swindall*, 971 F.2d 1531 (1992), cert. denied, 114 S. Ct. 683 (1994).

The court of appeals carefully examined the basis of the Eleventh Circuit's decision in *Swindall* and correctly concluded that the holding of *Swindall* is consistent with the court of appeals' analysis in this case. In *Swindall*, the defendant, a Congressman who sat on two committees that considered legislation on money laundering and structuring of financial transactions, 18 U.S.C. 1956 and 31 U.S.C. 5324, was charged with making false statements to a grand jury. Some of those statements related to Swindall's knowledge that certain financial transactions would violate the above-noted statutes. The Eleventh Circuit

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his committee membership. Moreover, membership in Congress is not a "necessary element" of the bribery charge in *Brewster*; the statute requires only status as a "public official." 18 U.S.C. 201(b)(2). Finally, *Brewster* does not imply that the Speech or Debate Clause is rendered inapplicable if protected acts are "necessary elements" of a particular bribery charge. Rather, the decision in *Brewster* indicates that status alone is *not* protected where it is used to demonstrate the purpose for which a bribe was offered.

reversed Swindall's convictions on the counts based on those statements, because it found that the government had sought to establish Swindall's knowledge concerning the scope of the federal statutes at issue by reference to his legislative activities—*i.e.*, his reading of certain legislation or committee reports and discussing the legislation with members of his congressional staff.

As the court of appeals in this case observed (Pet. App. A19), the opinion in *Swindall* stated that "the privilege [of the Speech or Debate Clause] protects legislative status as well as legislative acts." *Swindall*, 971 F.2d at 1543. But the point of that statement was that "the distinction between legislative 'status' and legislative 'activity' is not dispositive for Speech and Debate Clause purposes." Pet. App. A21.[3] Indeed, the Eleventh Circuit in *Swindall* explained that the key question is not whether "status" or "acts" are at issue, but whether the indictment requires an inquiry that would "directly impinge on or threaten the legislative process," "make legislators accountable before a possibly hostile judiciary," or "indirectly impair legislative deliberations." 971 F.2d at 1545. Having found that the inquiry into committee membership in *Swindall* would have had all three effects, the court held that the counts at issue in that case had to be dismissed.

The crucial fact for the Eleventh Circuit in *Swindall* was that the proof of the defendant's membership on the committee in that case was a surrogate for proof of the defendant's specific legislative acts—*i.e.*, his review of bills that came before the committee. Pet. App. A21-A23; *Swindall*, 971 F.2d at 1545. In this case, by contrast, the

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[3] Petitioner purports to agree with that interpretation of *Swindall*. See Pet. 21 (decision in *Swindall* not based on "static categories of 'status' and 'acts'").

indictment set forth petitioner's membership in Congress and on certain committees to demonstrate that others had a reason to offer him a gratuity, not to show that he performed any specific legislative acts. Pet. App. A22-A23. Because the reason for proving petitioner's membership on congressional committees does not involve any inquiry into specific legislative acts, the Eleventh Circuit's holding in *Swindall* is consistent with the Third Circuit's decision here.

2. Petitioner asserts (Pet. 14) that the court of appeals "held that [contact with the Executive Branch] always falls outside the protected legislative sphere" under the Speech or Debate Clause. That is incorrect. The court of appeals expressly recognized that certain types of contacts with Executive Branch officials, such as committee hearings, clearly fall within the core of protected legislative activities, while other contacts are just as clearly not protected. Pet. App. A43-A44;[4] see *Brewster*, 408 U.S. at 512; *United States* v. *Johnson*, 383 U.S. 169, 172 (1966). The court recognized that it is unclear whether activities falling between those two extremes, such as certain informal communications with Executive Branch officials, are protected. Pet. App. A44.

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[4] The court explained that legislative "oversight" of the Executive Branch includes both protected and unprotected acts (Pet. App. A44, citations omitted):

> Activities at one end of this spectrum, such as committee hearings, are clearly protected by the Speech or Debate Clause. Activities at the other end of the spectrum, such as routine casework for constituents, are just as clearly not protected. Whether the Speech or Debate Clause shields forms of 'oversight' falling between these extremes — for example, letters or other informal communications to Executive Branch officials from committee chairmen, ranking committee members, or other committee members — is less clear.

Petitioner's claim that the court of appeals held that such contact "always" is unprotected by the Speech or Debate Clause is unfounded.

Petitioner also contends (Pet. 8-14) that the court of appeals failed to follow decisions of this Court, *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975), and *Gravel* v. *United States*, 408 U.S. 606 (1972), which hold that the committee process and legislative oversight are core legislative activities that are protected under the Speech or Debate Clause.

The court of appeals' decision is consistent with this Court's decisions in *Eastland* and *Gravel*. In *Eastland*, the Court held that the issuance of a subpoena by a Senate subcommittee in the course of an investigation is protected activity. 421 U.S. at 504-507. In *Gravel*, the Court recognized that a member's conduct at legislative committee hearings is within the sphere of protected legislative activity. 408 U.S. at 624. No count of the indictment requires proof that petitioner engaged in either of the activities at issue in *Eastland* and *Gravel*—issuance of a committee subpoena or participation in committee hearings. Nor does any count require proof more generally of legislative acts undertaken by petitioner as a committee member or officer. Indeed, the court of appeals' decision follows directly from the standard articulated by this Court in *Gravel*: that to be protected under the Speech or Debate Clause, a member's activities "must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." 408 U.S. at 625.

3. Petitioner claims (Pet. 15) that proof of the RICO "enterprise" charged in the indictment "would absolutely require the sort of proof of the legislative process that the [Speech or Debate] Clause forbids."

Proof of the RICO "enterprise" in this case would not require any inquiry into matters protected by the Speech or Debate Clause. The RICO "enterprise" consisted of petitioner and the employees he supervised in his Washington office, on his committee staffs, and in his Pennsylvania office. As the court of appeals explained, it is possible to prove the RICO offense with evidence limited to non-protected official acts, Pet. App. A30-A31; see *Brewster*, 408 U.S. at 512, and to "evidence relating to unofficial or ultra vires conduct that is separate from the pattern of racketeering activity," Pet. App. A32. Contrary to petitioner's contention (Pet. 16), such proof would not require any inquiry into any protected, official act performed by any individual. Proof of the RICO enterprise therefore does not require any inquiry that would violate the Speech or Debate Clause.

4. Petitioner claims (Pet. 17-19) that the fact that he may choose to introduce evidence of legislative acts in his defense requires dismissal of the indictment.

Petitioner is mistaken, because nothing in the indictment requires him to introduce evidence of his legislative acts; the mere possibility that he may choose to do so does not require dismissal of the indictment. The court of appeals recognized that a Congressman may not be "*forced* to refute charges that directly implicate legitimate legislative acts." Pet. App. A28 n.14 (citing *Gravel*, 408 U.S. at 616). But this Court's holding in *Brewster* establishes that the Speech or Debate Clause does not require dismissal of an indictment because the defendant may choose to introduce evidence concerning legislative acts in his defense.

In *Brewster*, this Court approved a prosecution of a Senator for taking bribes in exchange for or because of the performance of a legislative act. As the dissent noted in that case, the indictment left the defendant with the obvious choice of defending himself by introducing evidence that he did not perform the legislative acts for which he was alleged to have received the bribe, or that he had legitimate reasons for supporting the legislation. See *Brewster*, 408 U.S. at 561 (White, J., dissenting). The Court nonetheless did not view that fact as barring the prosecution.

Petitioner is in precisely the same position as the defendant in *Brewster*: he may find it advantageous to introduce evidence of his legislative acts. The Speech or Debate Clause does not preclude him from doing so. But where proof of protected acts is not a necessary part of the government's burden, the introduction of such evidence by a Member seeking to establish a defense does not fall within the Clause's prohibition on his being "questioned" outside of Congress. Pet. App. A26-A28; see also *United States* v. *Myers*, 635 F.2d 932, 942 (2d Cir.), cert. denied, 449 U.S. 956 (1980). If it did, a defendant Member of Congress would be able to obtain complete immunity from prosecution by simply stating that he has decided to introduce evidence of official acts in his defense.

5. Finally, petitioner contends (Pet. 23-29) that the court of appeals erred in not requiring an elaborate pretrial procedure for prosecutions of Members of Congress, which would include a heightened pleading standard and a pretrial hearing to preview all of the government's evidence to determine, in advance of trial, whether its introduction would violate the Speech or Debate Clause.

The courts below correctly rejected petitioner's proposal. Under the collateral order doctrine, a defendant has a right to an interlocutory appeal from a district court's refusal to dismiss an indictment for violating the Speech or Debate Clause, in order to protect a Congressman's right under the Clause to avoid being questioned at all for acts done in either House. *Helstoski* v. *Meanor*, 442 U.S. 500, 506-508 (1979). An order refusing to dismiss an indictment on that ground satisfies the collateral order doctrine because (1) it represents a final rejection of the claim, (2) the Speech or Debate Clause issue is collateral to, and separable from, the principal issue at trial concerning the defendant's guilt or innocence, and (3) a Congressman would not enjoy the full protection of the Speech or Debate Clause if he could not avoid exposure to being questioned for acts done in either House on an indictment that clearly violated the Clause. *Ibid.*; Pet. App. A7-A8.

But this Court has never said that a Member of Congress, unlike any other criminal defendant, has a right to a pretrial ruling on every evidentiary question. That contention goes well beyond the collateral order doctrine and contravenes the principle that questions concerning the admissibility of evidence at a criminal trial are not separate from the merits of the case. Pet. App. A50; *DiBella* v. *United States*, 369 U.S. 121, 126-127, 131-132 (1962). Once the district court and the court of appeals have agreed that the charges are permissible under the Speech or Debate Clause, there remains no necessity for further interlocutory appellate review of issues in the case. Nothing in this Court's decision in *Helstoski* v. *Meanor* allowing an interlocutory appeal of "the District Court order denying dismissal of the indictment" on Speech or Debate Clause grounds, 442

U.S. at 508, suggested that a defendant is thereby entitled to a complete preview of the trial evidence and rulings on every evidentiary issue. See Pet. App. A88-A89 & n.7.

The court of appeals agreed that an indictment should be drawn with enough specificity regarding the nature of the charges that a motion for dismissal under the Speech or Debate Clause "can be adequately litigated and decided." Pet. App. A39. It also found that that requirement was satisfied in this case, where the indictment is "replete with factual details." *Ibid.* As both courts below recognized, petitioner is of course free to ask the district court to make further rulings before or during trial concerning specific evidence that might be inadmissible on Speech or Debate Clause grounds. *Id.* at A50, A88. But once it is determined that the prosecution is not entirely barred on Speech or Debate Clause grounds, it should be left up to the trial court, as in any other criminal case, to resolve evidentiary questions as they arise during trial.

The cases petitioner cites (Pet. 25 n.4) for the proposition that further detailed pretrial procedures should have been required do not support his argument. Rather, those cases stand for the same principle that controls the interlocutory appeal in this case: where a defendant claims the right to pretrial dismissal of a charge brought against him because forcing him to go to trial on that charge would violate the Double Jeopardy (or Speech or Debate) Clause, he is entitled to a pretrial ruling and an interlocutory appeal on the question of whether the charge must be dismissed. In that context, courts have tailored the procedures—including the allocation of the burden of proof—to the particular context in which the pretrial ruling must be made. See *United States* v. *Ragins*, 840 F.2d 1184, 1192 (4th Cir.

1988) (citing cases).[5] Courts addressing Speech or Debate Clause claims that charges must be dismissed may, where appropriate, similarly tailor their procedures as necessary to permit full and fair litigation of the issue. In this case, however, petitioner had a full and fair opportunity in both the district court and the court of appeals to litigate his claim that the Speech or Debate Clause prohibits some or all of the counts in the indictment brought against him. No further procedures are necessary to resolve that question.

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[5] Ordinarily, claims that a successive prosecution violates the Double Jeopardy Clause can be resolved on the basis of a comparison of the statutes under which the defendant was charged, without any evidentiary hearing or allocation of the burden of proof at all. See *United States* v. *Dixon*, 113 S. Ct. 2849, 2859-2864 (1993) (successive prosecutions under different statutes permitted only where each statute requires proof of an element not required by the other). Sometimes, however, a defendant is prosecuted more than once under the same or related conspiracy statutes, and the double jeopardy issue turns on whether the successive prosecutions are for the same conspiracy. All of the cases cited by petitioner (Pet. 25 n.4) concern that issue or the closely related issue that arises under the collateral estoppel doctrine. The resolution of that issue may turn in part on the facts that the government intends to prove at trial. Accordingly, a pretrial evidentiary hearing may be required. See, *e.g.*, *United States* v. *Loyd*, 743 F.2d 1555, 1562-1563 (11th Cir. 1984). At that stage of the proceedings, the government has within its control and knowledge the facts that it intends to prove at trial. The burden of proof on that issue, when it arises in the pretrial context, is therefore often placed on the government.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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